

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;

Plaintiff,

vs.

HAWAIIAN EXPRESS SERVICE,
INC., et al.,

Defendants.

) CIVIL NO. CV03-00385 SOM-LEK

) (Copyright)

)

) **MEMORANDUM IN SUPPORT OF**

) **DEFENDANT PCT'S MOTION FOR**

) **PARTIAL SUMMARY JUDGMENT**

) **ON DAMAGES**

)

) Hearing:

) Date: October 24, 2005

) Time: 10:30 a.m.

) Judge: Hon. Susan Oki Mollway

) Trial Date: January 24, 2006

)

allocation that Mr. Ueno assumed away. *Mackie*, 296 F.3d at 915-16; *see also Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004).

Mr. Ueno's finding that Fleming was profitable at all was entirely incompetent. To calculate Fleming's alleged profits in the period immediately following its bankruptcy, Ueno used some combination of industry average profits and projections. Even though they were available, Mr. Ueno never examined Fleming's actual financial records from the period in question. Ex. C at 22:20-22:24, 26:18-26:22; Ex. D. His result is grossly exaggerated. A correct analysis, as Fleming's expert conducted, shows that the Hawaii division lost \$861,478 during the infringement period. Ex. B at ¶ 43. Absent any profit at all, Berry's share of that profit is likewise zero.

Ueno applied similarly faulty methods in calculating his other damage models. Just like a profits-based remedy, a showing of actual damages must be connected to the infringement. Despite the Ninth Circuit requirement to calculate the loss in the fair market value of the infringed product, Ueno instead calculated what he called a "reasonable license fee." Even on this faulty premise, Mr. Ueno's calculation of that "reasonable" fee ranges from a low of two million dollars to a high of three hundred million dollars -- on a product that Wayne Berry admits he licensed to Fleming **for free**. Ex. H ("no charge user license"). It is no hyperbole to assert that Mr. Ueno has wildly exaggerated his damage numbers. By any competent measure, the most damages Berry might causally prove are the \$16,800 in fees he would have made had Fleming paid him to make the allegedly infringing changes to the software, and even this figure is generous.

Berry fails to make any admissible showing of any profits-based damages at all. Because connection to profit is an element of Berry's vicarious infringement claim, this Court should dismiss that claim outright. The Court should also limit damages for Berry's direct infringement claim against Fleming to no more than

Dated: Honolulu, Hawaii, August 24, 2005



KOBAYASHI, SUGITA & GODA

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Co-Counsel for the Post Confirmation Trust for
Fleming Companies, Inc.

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Attorneys for Defendant
POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;) CIVIL NO. CV03-00385 SOM LEK
) (Copyright)
Plaintiff,)
) DECLARATION OF DAMIAN D.
vs.) CAPOZZOLA; EXHIBITS "A"
) THROUGH "M"
HAWAIIAN EXPRESS SERVICE,)
INC., a California corporation; H.E.S.) <u>Hearing:</u>
(CAPTION CONTINUED)) Date: October 24, 2005

TRANSPORTATION SERVICES, INC.,)	Time:	10:30 a.m.
a California corporation; CALIFORNIA)	Judge:	Hon. Susan Oki Mollway
PACIFIC CONSOLIDATORS, INC., a)	Trial Date:	January 24, 2006
California corporation; JEFFREY P.)		
GRAHAM and PETER SCHAUL,)		
California citizens; MARK DILLON and)		
TERESA NOA, BRIAN)		
CHRISTENSEN, Hawaii citizens;)		
FLEMING COMPANIES, INC., an)		
Oklahoma corporation; C&S)		
LOGISTICS OF HAWAII, LLC, a)	Trial Date:	January 24, 2006
Delaware LLC; C&S WHOLESALE)	Judge:	Susan Oki Mollway
GROCERS, INC., a Vermont)		
corporation; C&S ACQUISITIONS,)		
LLC; FOODLAND SUPER MARKET,)		
LIMITED, a Hawaii corporation;)		
HAWAII TRANSFER COMPANY,)		
LIMITED, a Hawaii corporation;)		
RICHARD COHEN, a New Hampshire)		
citizen, ES3, LLC, Delaware Limited)		
Liability Company, MELVIN PONCE,)		
SONIA PURDY, JUSTIN FUKUMOTO,))		
AFREDDA WAIOLAMA,)		
JACQUELINE RIO, Hawaii citizens;)		
JESSIE GONZALES, LUIZ)		
RODRIGUES, AL PEREZ and)		
PATRICK HIRAYAMA, California)		
citizens; GUIDANCE SOFTWARE,)		
LLC, a California LLC; MICHAEL)		
GURZI, a California citizen; ALIX)		
PARTNERS, LLC a Delaware LLC;)		
DOE INDIVIDUALS 2-350; DOE)		
PARTNERSHIPS, CORPORATIONS)		
and OTHER DOE ENTITIES 2-20,)		
)		
Defendants.)		
)		
)		

DECLARATION OF DAMIAN D. CAPOZZOLA

I, DAMIAN D. CAPOZZOLA, declare that:

1. I am an attorney at the law firm of KIRKLAND & ELLIS, LLP, attorneys for Defendant PCT and am duly authorized to make this affidavit.
2. I am licensed to practice law in the State of California and have been admitted pro hac vice in this case. I know the following to be true through my work in this case.
3. Attached hereto as Exhibit "A" is a true and correct copy of this Court's June 27, 2005 summary judgment ruling.
4. Attached hereto collectively as Exhibit "B" is a true and correct copy of the June 16, 2005 expert report by Jeffrey H. Kinrich of Analysis Group, Inc., and the June 20, 2005 transmittal e-mail, all prefaced by Mr. Kinrich's authenticating declaration dated August 19, 2005.
5. Attached hereto as Exhibit "C" are true and correct copies of excerpts from the July 22, 2005 deposition of Thomas T. Ueno.
6. Attached hereto as Exhibit "D" are true and correct copies of correspondence between counsel sent and received on the dates indicated.
7. Attached hereto as Exhibit "E" is a true and correct copy of the expert report of Thomas T. Ueno dated on or about March 21, 2005.
8. Attached hereto as Exhibit "F" is a true and correct copy of the prepetition jury verdict dated on or about March 6, 2003.
9. Attached hereto as Exhibit "G" is a true and correct copy of an agreement between Fleming and API dated on or about October 7, 1999.
10. Attached hereto as Exhibit "H" is a true and correct copy of a letter agreement between Fleming and Berry dated on or about November 26, 1999.
11. Attached hereto as Exhibit "I" is a true and correct copy of a letter

from Wayne Berry to Y. Hata dated on or about June 6, 2002.

12. Attached hereto as Exhibit "J" are true and correct excerpts from testimony from Wayne Berry dated February 25, 2003.

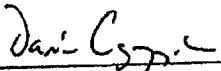
13. Attached hereto as Exhibit "K" is a true and correct copy of correspondence from API to Fleming dated on or about September 16, 1999.

14. Attached hereto as Exhibit "L" is a true and correct excerpt from the transcript of the January 17, 2003 summary judgment hearing in the prepetition trial.

15. Attached hereto as Exhibit "M" is a true and correct set of excerpts from Berry's Second Amended Verified Complaint in this matter.

//

So sworn under penalty of perjury under the laws of the United States of America in Los Angeles, California on August 24, 2005.



Damian D. Capozzola

EXHIBIT D

Damian Capozzola/Los Angeles/Kirkland-Ellis
07/08/2005 05:57 PM

To tueno@hawaii.rr.com
ael@kslaw.com, "Eric Liebler" <elieber@kirkland.com>, "Emily Reber Porter" <eporter@goodsill.com>, "Rex Fujichaku" <fujichaku@hotmail.com>, "John T. Komeiji" <JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll" <lawtoll@comcast.net>, "Lex Smith" <lex@gle.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery Bronster" <mbronster@bchlawnet>, Olivia Samad/Los Angeles/Kirkland-Ellis@K&E, "Rex Y. Fujichaku" <rfujichaku@bchlawnet>, rpbm@Hosodalaw.Com, "Roy Tjioe" <rtjioe@goodsill.com>, "Timothy J. Hogan" <tjh@loio.com>, "Victor Limongelli" <vlimongelli@guidancesoftware.com>, "Wesley H. Ching" <WHC@fmhc-law.com>, dcapozzola@kirkland.com, gtom@wik.com
bcc Berry LAS
Subject Fw: PCT-B 000001-000376

Dear Mr. Ueno,

Mr. Hogan recently provided us with your June 21, 2005 "Exhibit A" to the operative Protective Order. Accordingly, we are again sending you PCT-B 000001-000376 subject to the same terms as below. If you have not received these materials by close of business on Monday, July 11, please alert me or Mr. Hogan.

Please also find attached 000377-000379 (in the attached file PCT Docs.pdf); these documents are not subject to any confidentiality restriction.

Thank you for your attention to these matters.

--Damian Capozzola



- PCT Docs.pdf

----- Forwarded by Damian Capozzola/Los Angeles/Kirkland-Ellis on 07/08/2005 05:51 PM -----

Damian Capozzola/Los Angeles/Kirkland-Ellis
04/25/2005 04:56 PM

To tueno@hawaii.rr.com
"Eric Liebler" <elieber@kirkland.com>, "Erin Lee" <eol@fmhc-law.com>, "Emily Reber Porter" <eporter@goodsill.com>, "Julia Morgan" <jmm@fmhc-law.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll" <lawtoll@comcast.net>, "Leroy Colombe" <lcolombe@ckdbw.com>, "Lex Smith" <lex@gle.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery Bronster" <mbronster@bchlawnet>, "Rex Y. Fujichaku" <rfujichaku@bchlawnet>, "Roy Tjioe" <rtjioe@goodsill.com>, "Victor Limongelli" <vlimongelli@guidancesoftware.com>, "Wesley H. Ching" <WHC@fmhc-law.com>, "Timothy J. Hogan" <tjh@loio.com>
cc
Subject PCT-B 000001-000376

Dear Mr. Ueno,

As you may know, Kirkland & Ellis represents the Post-Confirmation Trust for Fleming Companies, Inc. in connection with the matter of Wayne Berry v. Hawaiian Express Service, Inc., et al. We are sending you today via Federal Express documents PCT-B 000001 to 000376. These documents have been designated and ordered confidential for your eyes only. Because of that designation, neither these documents nor their contents may be shared either with Mr. Hogan or Mr. Berry. Given Mr. Berry's past conduct with respect to the PCT and its predecessors, we respectfully insist on strict and literal compliance with the protective order.

Thank you for your attention to these matters.

Sincerely,

Damian Capozzola

FedEx, US AirbillFedEx
Tracking
Number

8521 2279 7627

Express

1 From 7/8/05 Sender's FedEx
Date Account Number 1247-3559-6Sender's Name Allison Andrews Phone (213) 680-8400Company KIRKLAND & ELLIS LLPAddress 777 S FIGUEROA ST FL 37City LOS ANGELES State CA ZIP 90017-58002 Your Internal Billing Reference 41445-63 To Thomas Veno Phone 808 591-0841Company HanduluRecipient's Address 844 Queen StreetCity Honolulu State HI ZIP 96813Try online shipping at fedex.comBy using the Airbill you agree to the terms and conditions on the back of this Airbill and in our contract with you. For more information, please visit www.fedex.com.
Questions? Visit our Web site at fedex.com or call 1.800.468.1333.

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Delivery date	Jul 11, 2005 4:41 PM	Weight	7.0 lbs.
Status	Delivered		

Date/Time	Activity	Location	Details
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	9:33 AM On FedEx vehicle for delivery	HONOLULU, HI	
	7:52 AM At local FedEx facility	HONOLULU, HI	
Jul 9, 2005	1:53 AM Arrived at FedEx location	OAKLAND, CA	
Jul 8, 2005	10:53 PM Departed FedEx location	LOS ANGELES, CA	
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Damian Capozzola/Los Angeles/Kirkland-Ellis
07/12/2005 02:33 PM

To tjh@loio.com
ael@ksqlaw.com, "Eric Liebler" <eliebler@kirkland.com>, "Emily Reber Porter \\\(E-mail)" <eporter@goodsill.com>, "Rex Fujichaku" <fujichaku@hotmail.com>, gtom@wik.com, "John T. Komeiji" <JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll \\\(E-mail)" <lawtoll@comcast.net>, "Lex Smith" <lex@gte.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery Bronster \\\(E-mail)" <mbronster@bchlawnet>, "Olivia Samad" <OSamad@kirkland.com>, "Rex Y. Fujichaku" <rfujichaku@bchlawnet>, rpbm@Hosodalaw.Com, "Roy Tjoe \\\(E-mail)" <rtjoe@goodsill.com>, "Timothy J. Hogan" <tjh@loio.com>, "Victor Limongelli \\\(E-mail)" <victor.limongelli@guidancesoftware.com>, "Wesley H. Ching \\\(E-mail)" <WHC@fmhc-law.com>

bcc

Subject RE: Various document issues

Mr. Hogan,

Can you please confirm you will be producing the Ueno documents on or before the 18th? Thank you.

-Damian

Damian Capozzola/Los Angeles/Kirkland-Ellis

Damian Capozzola/Los Angeles/Kirkland-Ellis
07/11/2005 05:18 PM

To "Timothy J. Hogan" <tjh@loio.com>
ael@ksqlaw.com, "Eric Liebler" <eliebler@kirkland.com>, "Emily Reber Porter \\\(E-mail)" <eporter@goodsill.com>, "Rex Fujichaku" <fujichaku@hotmail.com>, gtom@wik.com, "John T. Komeiji" <JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll \\\(E-mail)" <lawtoll@comcast.net>, "Lex Smith" <lex@gte.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery Bronster \\\(E-mail)" <mbronster@bchlawnet>, "Olivia Samad" <OSamad@kirkland.com>, "Rex Y. Fujichaku" <rfujichaku@bchlawnet>, rpbm@Hosodalaw.Com, "Roy Tjoe \\\(E-mail)" <rtjoe@goodsill.com>, "Victor Limongelli \\\(E-mail)" <victor.limongelli@guidancesoftware.com>, "Wesley H. Ching \\\(E-mail)" <WHC@fmhc-law.com>
Subject RE: Various document issues

Mr. Hogan:

If it was not clearly implied, let it be now: they will be going out FedEx to you tonight.

Are you going to be producing the Ueno documents to Lex's office on or before July 18? Please clarify. Thank you for your attention to these matters.

--Damian Capozzola

"Timothy J. Hogan" <tjh@loio.com>



"Timothy J. Hogan"
<tjh@loio.com>
07/11/2005 05:13 PM

To "Damian Capozzola" <dcapozzola@kirkland.com>
<acl@ksqlaw.com>, "Eric Liebeler"
<eliebeler@kirkland.com>, "Emily Reber Porter" (E-mail)
<eporter@goodsill.com>, "Rex Fujichaku"
<fujichaku@hotmail.com>, "John T. Komeiji"
<JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>,
"Sheldon Toll" (E-mail) <lawtoll@comcast.net>, "Lex Smith"
<lex@gte.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle"
cc Hosoda" <lshosoda@hotmail.com>, "Margery Bronster"
(E-mail) <mbronster@bchlaw.net>, "Olivia Samad"
<OSamad@kirkland.com>, "Rex Y. Fujichaku"
<rfujichaku@bchlaw.net>, <rpbm@Hosodalaw.Com>, "Roy"
Tjioe (E-mail) <rtjioe@goodsill.com>, "Victor Limongelli"
(E-mail) <victor.limongelli@guidancesoftware.com>,
"Wesley H. Ching" (E-mail) <WHC@fmhc-law.com>,
<gtom@wik.com>

Subject RE: Various document issues

Mr. Capozzola:

Are you going to be sending the financial documents now so that I may have them in advance of the Ueno deposition?

Thanks,

Tim Hogan

Timothy J. Hogan
Lynch Ichida Thompson Kim & Hirota
1132 Bishop Street, Suite 1405
Honolulu, Hawaii 96813
Tel. (808) 528-0100
Fax. (808) 528-4997
Email tjh@loio.com

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prohibited. Any inadvertent receipt shall not be a waiver of any privilege or work product protection. Please contact the sender at tjb@loio.com or at (808) 528-0100.

From: Damian Capozzola [<mailto:dcazzola@kirkland.com>]
Sent: Monday, July 11, 2005 2:09 PM
To: Timothy J. Hogan
Cc: ael@ksglaw.com; Eric Liebler; Emily Reber Porter (E-mail); Rex Fujichaku; John T. Kornelji; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; rpbm@Hosodalaw.Com; Roy Tjioe (E-mail); Timothy J. Hogan; Victor Limongelli (E-mail); Wesley H. Ching (E-mail); dcazzola@kirkland.com; gtom@wik.com
Subject: Various document issues

Mr. Hogan,

This e-mail addresses various issues raised by our communications on Friday afternoon.

First, PCT-B 000001-000376 contain financial information for Fleming's Hawaii facility for April - August 2003. Under the present circumstances and to avoid the need to burden Master Matsui with this issue yet again, we agree that you may review the documents. This applies to you only, not Mr. Berry, regardless of whether or not you subsequently circulate an "Ex. A" for Mr. Berry. We will send you a copy set of the materials. Other counsel who would also like a set should please advise.

Second, if July 18 is truly the best you and Mr. Ueno can do with regard to producing the Ueno documents, I suppose we have little choice but to accept. We will be pleased to extend you the same courtesy and provide you with the remainder of the Kinrich documents four days before Mr. Kinrich's deposition.

Thank you for your attention to these matters.

--Damian Capozzola

The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis LLP or Kirkland & Ellis International LLP. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return e-mail or by e-mail to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.

Damian Capozzola/Los
Angeles/Kirkland-Ellis
07/12/2005 06:32 PM

To "Hogan" <tjh@loio.com>
cc "Lex" <lrs@ksglaw.com>, "Anne" <aet@ksglaw.com>
bcc "Allison" <amandrews@kirkland.com>; "Ed"
<eyep@kirkland.com>; "Neal" <nsandiego@kirkland.com>
Subject Re: Discovery

I assume these are PCT-B 001-376. If so, you and Mr. Ueno may both view them, stamped legend notwithstanding.

Please confirm your e-mail means the Ueno documents will be at Lex's office prior to close of business on July 18.

Thank you for your attention to these matters.

Damian Capozzola

----- Original Message -----
From: "Timothy J. Hogan" [tjh@loio.com]
Sent: 07/12/2005 08:26 PM
To: <dcapozzola@kirkland.com>
Subject: Discovery

It is my understanding Mr. Ueno will produce his materials on or before 7/18/05. In addition, I have received a package from you containing documents marked as Experts Eyes only. Before I or Mr. Ueno view them, I need to confirm that I may view these documents.

Tim Hogan

Timothy J. Hogan
Lynch Ichida Thompson Kim & Hirota
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